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UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION

MAHESH KUMAR PATHAK,  
 Petitioner,  
 v.

No. C 07-4691 TEH

MICHAEL CHERTOFF, Secretary of the  
 Department of Homeland Security;  
 EMILIO C. FLORES, Chief of  
 Correction, Santa Clara County, Department  
 of Correction;  
 NANCY ALCANTAR, Field Office Director,  
 Office of Detention and Removal,  
 Immigration and Custom Enforcement;  
 ALBERTO R. GONZALES, U. S.  
 Attorney General,

RESPONDENTS' RETURN IN  
 OPPOSITION AND RESPONSE TO THE  
 COURT'S SEPTEMBER 28, 2007 ORDER  
 TO SHOW CAUSE

Respondents.

I. INTRODUCTION

Petitioner Mahesh Kumar Pathak is a native and citizen of India, who has been ordered removed from the United States, and who has been in United States Immigration and Customs Enforcement ("ICE") detention since August 3, 2007, pending his removal. On September 12, 2007, Petitioner filed this petition for writ of habeas corpus under 28 U.S.C. § 2241 ("Petition"), challenging his continued detention.

For the reasons set out below, Respondents oppose the petition.

## II. BACKGROUND

Pathak petitioned to the Ninth Circuit Court of Appeals for review of the Board of Immigration Appeals' ("BIA") decision affirming the denial of his asylum application. On October 27, 2006, the Ninth Circuit dismissed in part and denied in part Pathak's Petition for Review. *See* Petition, Exh. B. The Ninth Circuit denied Pathak's petition for rehearing, and on February 2, 2007, the mandate issued. *Id.*

In August 2006, Petitioner's wife, a United States citizen, petitioned for immediate relative status for Petitioner in light of their marriage, but while his wife appeared for the interview with U.S. Citizenship and Immigration Services in April 2007, Petitioner failed to appear. Declaration of Ila C. Deiss ("Deiss Decl."), Exh. 1. That application was therefore denied in April 2007. *Id.* Pathak's wife has apparently re-petitioned for a visa for him in July 2007, and that decision is pending. *See* Petition, Exh. D.

On May 1, 2007, ICE directed Petitioner to surrender for removal to India on June 5, 2007. Deiss Decl., Exh. 2. Petitioner failed to surrender on that date and did not contact ICE, rendering him a fugitive. *Id.* ICE officers eventually located Petitioner at his cousin's home on August 3, 2007 and took him into custody. Deiss Decl., Exh. 3.

## III. LEGAL STANDARDS

Habeas corpus relief is appropriate when a person "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c).

## IV. ARGUMENT

### A. Petitioner is Being Lawfully Detained Under 8 U.S.C. § 1231

The post-removal order detention statute, INA § 241(a), 8 U.S.C. § 1231(a), provides for the mandatory detention of aliens awaiting removal from the United States for an initial period of three months.<sup>1</sup> This initial three months period may be followed by an additional three months discretionary detention during which time detention remains presumptively valid. *Zadvydas v.*

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<sup>1</sup>Petitioner concedes that he has nothing pending before the Ninth Circuit and is now subject to post-removal order detention. *See* Petitioner's Motion to Strike, dated September 14, 2007.

1 *Davis*, 533 U.S. 678, 121 S.Ct. 2491, 2505 (2001).

2 The “removal period” began for Petitioner on “the date of [Ninth Circuit’s] final order.” 8 U  
 3 .S.C. § 1231(a)(1)(B)(ii). However, under INA § 241(a)(1)(C), 8 U.S.C. § 1231(a)(1)(C), titled  
 4 “Suspension of Period,” “the removal period shall be extended ... and the alien may remain in  
 5 detention during such extended period if the alien fails or refuses to make timely application in  
 6 good faith for travel or other documents necessary to the alien’s departure or conspires or acts to  
 7 prevent the alien’s removal subject to an order of removal.” 8 U.S.C. § 1231(a)(1)(C). The Ninth  
 8 Circuit has interpreted Section 241(a)(1)(C) as authorizing continued detention of a removable  
 9 alien “so long as the alien fails to cooperate fully and honestly with officials to obtain travel  
 10 documents.” *Lema v. I.N.S.*, 341 F.3d 853, 857 (9th Cir.2003)(emphasis added); *see also Pelich v.*  
 11 *INS*, 329 F.3d 1057, 1060 (9th Cir. 2003)(holding that *Zadvydas* does not apply where an alien  
 12 holds the “‘keys [to his freedom] in his pocket’ and could likely effectuate his removal by  
 13 providing the information requested by the INS.”).

14 Here, Petitioner correctly notes that Respondents could have removed him anytime after the  
 15 issuance of the Ninth Circuit’s mandate on February 2, 2007. *See* Petition, ¶ 31. Petitioner,  
 16 however, does not mention that he was a fugitive until August 2007, rendering his removal during  
 17 that period impossible. Petitioner clearly failed to cooperate and prevented his removal, which has  
 18 extended the removal period beyond the presumptively reasonable period expressed in *Zadvydas*.  
 19 Respondents are actively trying to secure travel documents for Petitioner and Petitioner has  
 20 presented no evidence that India will not accept him upon removal. Moreover, Petitioner failed to  
 21 appear at his visa petition interview, proving himself to be a flight risk, supporting continued  
 22 detention, if necessary, under 8 U.S.C. § 1231(a)(6).

### 23 **B. Petitioner Remaining Claims Are Barred by the Real ID Act.**

24 The lion’s share of this petition describes in painful detail Petitioner’s asylum application and  
 25 the merits of his motion to reopen, Petition, ¶¶ 6-30, none of which is relevant to this habeas  
 26 petition or reviewable by this Court pursuant to the REAL ID Act of 2005. The REAL ID Act  
 27 amended the Immigration and Nationality Act, eliminating federal habeas corpus jurisdiction over  
 28 final orders of removal. *See* Pub.L. No. 109-13, Div. B, 119 Stat. 231 (May 11, 2005). Under

1 Section 106 of the Act, "a petition for review filed with an appropriate court of appeals in  
2 accordance with this section shall be the sole and exclusive means for judicial review of an order  
3 of removal entered or issued under any provision of [the Immigration and Nationality Act]." 8  
4 U.S.C. § 1252(a)(5). This provision makes clear that this Court does not have jurisdiction to  
5 entertain Petitioner's challenge to his final removal order.

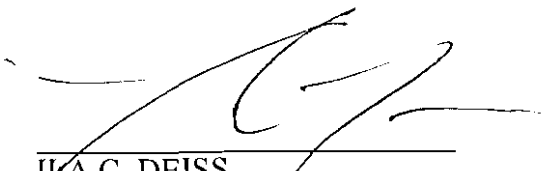
6 V. CONCLUSION

7 For the foregoing reasons, the petition for a writ of habeas corpus should be denied.

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9 Dated: October 15, 2007

Respectfully submitted,

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11 United States Attorney

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15 ILA C. DEISS  
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